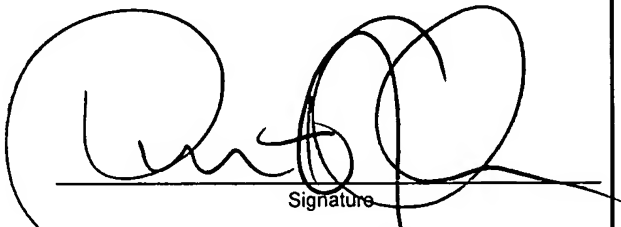




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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional)	
<p>I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]</p> <p>on _____</p> <p>Signature _____</p> <p>Typed or printed name <u>Timothy J. Churna</u></p>		Application Number	Filed
		<u>10/730,066</u>	<u>12/09/03</u>
		First Named Inventor	
		<u>Gary MERCER</u>	
		Art Unit	Examiner
		<u>2940</u>	<u>To Be Assigned</u>
<p>Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.</p> <p>This request is being filed with a notice of appeal.</p> <p>The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.</p>			
<p>I am the</p> <p><input type="checkbox"/> applicant/inventor.</p> <p><input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)</p> <p><input checked="" type="checkbox"/> attorney or agent of record. <u>48,340</u></p> <p><input type="checkbox"/> attorney or agent acting under 37 CFR 1.34.</p> <p>Registration number if acting under 37 CFR 1.34 _____</p>		<p> Signature _____ <u>Timothy J. Churna</u> Typed or printed name _____</p> <p><u>202/639-1108</u> Telephone number _____</p> <p><u>December 18, 2006</u> Date _____</p>	
<p>NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.</p>			
<p><input checked="" type="checkbox"/> *Total of <u>1</u> forms are submitted.</p>			

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.



PATENT
Attorney Docket No. 018853.0753

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:)	
)	
Gary MERCER <u>et al.</u>)	Examiner Not yet assigned
)	
Application Number: 10/730,066)	Group Art Unit 1761
)	
Filed: December 9, 2003)	Confirmation No. 2940
)	
For: FRYERS WHICH DEACTIVATE)	
BEFORE A LEVEL OF A COOKING)	
MEDIUM FALLS BELOW A)	
MINIMUM LEVEL, AND METHODS)	
OF DEACTIVATING SUCH FRYERS)	

REMARKS ACCOMPANYING PRE-APPEAL BRIEF REQUEST FOR REVIEW

MAIL STOP AF
Commissioner for Patents
U.S. Patent and Trademark Office
Customer Service Window
Randolph Building
401 Dulany Street
Alexandria, VA 22314

Sir:

Applicants are submitting the following remarks with a Pre-Appeal Brief Request for Review in accordance with the Official Gazette Notice of July 12, 2005, and the Extension of Pre-Appeal Brief Conference Program, dated January 10, 2006. Applicants are filing this Request concurrently with a Notice of Appeal and a Request for a One-Month Extension of Time to respond to the final Office Action in the above-captioned patent application. Applicants respectfully request that the Panel of Examiners (the "Panel") reconsider the above-captioned patent application in view of the following remarks.

12/19/2006 BABRAHA1 00000131 10730066

01 FC:2401	250.00 OP
02 FC:2402	250.00 OP

Repln. Ref: 12/19/2006 BABRAHA1 0012400300
DAH:020375 Name/Number:10730066
FC: 9204 \$310.00 CR

Remarks:

1. Rejections

Claims 1-5, 7-11, 14-16, and 18-22 stand rejected under 35 U.S.C. § 102(b), as allegedly being anticipated by U.S. Patent No. 4,539,898 to Bishop et al. (“Bishop”), and claims 23, 29-32, and 36-40 stand rejected under 35 U.S.C. § 102(b), as allegedly being anticipated by U.S. Patent No. 5,586,486 to Nitschke et al. (“Nitschke”). Moreover, claim 6 stands rejected under 35 U.S.C. § 103(a), as allegedly being rendered obvious by Bishop in view of U.S. Patent No. 5,910,206 to McNamara, and claims 12 and 13 stand rejected under 35 U.S.C. § 103(a), as allegedly being rendered obvious by Bishop in view of U.S. Patent No. 6,427,580 to Benedictus et al. (“Benedictus”). In addition, claim 17 stands rejected under 35 U.S.C. § 103(a), as allegedly being rendered obvious by Bishop in view of U.S. Patent No. 5,776,530 to Davis et al. (“Davis”), and claims 24-28 and 33 stand rejected under 35 U.S.C. § 103(a), as allegedly being rendered obvious by Nitschke in view of U.S. Patent No. 6,354,192 to Tateyama, and claims 34 and 35 stand rejected under 35 U.S.C. § 103(a), as allegedly being rendered obvious by Nitschke in view of Benedictus.

2. 35 U.S.C. § 102(b)

Claims 1-5, 7-11, 14-16, and 18-22 stand rejected as allegedly being anticipated by Bishop, and claims 23, 29-32, and 36-40 stand rejected as allegedly being anticipated by Nitschke.

a. Independent Claim 1

Applicants independent claim 1 describes that the controller **deactivates** the means for heating when the temperature of the vessel wall is greater than or equal to a predetermined temperature and/or when the difference between the temperature of the vessel wall and the temperature the cooking medium (or air within the cooking medium) is greater than or equal to a predetermined temperature difference.

In contrast to Applicants’ claimed invention as set forth in independent claim 1, Bishop merely describes that a heat sensor 94 is positioned in a vat 82 such that heat sensor 94 is covered with a cooking oil 96; a temperature probe 160 is used to monitor the temperature of vat 82; and when the temperature of vat 82 drops to a predetermined amount below a value set on a

temperature setting means 162, a switch means will close to **apply power to** a heater unit 156. See, e.g., Bishop, Column 8, Lines 59-63. As such, Bishop does **not** disclose or suggest **deactivating** the means for heating when at least one of the predetermined conditions from independent claim 1 is satisfied.

Nevertheless, the Office Action **does not even consider** whether Bishop discloses that the controller deactivates the means for heating when the temperature of the vessel wall is greater than or equal to a predetermined temperature and/or when the difference between the temperature of the vessel wall and the temperature the cooking medium (or air within the cooking medium) is greater than or equal to a predetermined temperature difference, as set forth in independent claim 1. Specifically, the Office Action asserts that “the operation of the controller is not structurally limiting [because] . . . [t]he operational steps are intended use and the one definitive structural limitation is that of a controller. Bishop discloses all of the structural limitations of the claim.” Office Action, Page 7, Lines 4-7. Thus, the Office Action asserts that Bishop merely needs to describe **any** controller in order to disclose Applicants’ claimed controller. Applicants respectfully disagree with the Office Action’s assertions.

Specifically, “a functional limitation is an attempt to define something by what it does, rather than by what it is. There is nothing inherently wrong with defining some part of an invention in functional terms. Functional language does not, in and of itself, render a claim improper. A functional limitation is **often used** in association with an element, ingredient, or step of a process **to define a particular capability or purpose that is served by the recited element, ingredient, or step.**” MPEP 2173.05(g).

In the above-captioned patent application, the limitation of independent claim 1 that the controller deactivates the means for heating when the temperature of the vessel wall is greater than or equal to a predetermined temperature and/or when the difference between the temperature of the vessel wall and the temperature the cooking medium (or air within the cooking medium) is greater than or equal to a predetermined temperature difference is a functional limitation, and as such, the Office Action **must show that Bishop discloses this limitation**. For at least the reasons set forth above, Applicants respectfully submit that Bishop does not disclose this limitation. Therefore, Applicants respectfully request that the Examiner withdraw the anticipation rejection of independent claim 1.

b. Independent Claim 23

Applicants independent claim 23 describes a method which comprises the steps of determining the temperature of the cooking medium or the temperature of air within the cooking vessel, determining the temperature of the vessel wall, and deactivating the means for heating when the temperature of the vessel wall is greater than or equal to a predetermined temperature and/or when the difference between the temperature of the vessel wall and the temperature the cooking medium (or air within the cooking medium) is greater than or equal to a predetermined temperature difference. Thus, in Applicants' claimed invention as set forth in independent claim 23, the temperature of the vessel wall is determined.

The Office Action asserts that Nitschke describes an operation of a fryer in which a first temperature sensor 236 determines a temperature of the cooking medium, and a second temperature sensor 238 which determines a temperature of the vessel wall. Applicants respectfully disagree with the Examiner's assertions.

For example, Nitschke states:

One embodiment for detecting oil level, shown in FIG. 22, includes a first temperature sensor 236 and a second temperature sensor 238 mounted within the oil reservoir 35 of the frying vessel 36 and connected as inputs to the controller 28. The first temperature sensor 236 and second temperature sensor 238 are commercially available thermistors. The second temperature sensor 238 is preferably mounted on the inside of the frying vessel 36 at a level that is about equal to, or just below, the desired oil level. The first temperature sensor 236 is also mounted within the cooking vessel 36 at a relatively deeper location within the reservoir. When the cooking oil is at the normal level, each of the temperature sensors will indicate **approximately the same temperature**, the temperature of the oil. If the oil level falls below the level of the second temperature sensor 238, it will begin to register a **significantly lower temperature**. Thus, by periodically monitoring each of these temperature sensors, the control can determine when the oil level within the frying vessel 36 has fallen below a predetermined acceptable level.

Nitschke, Column 4, Lines 54-67; and Column 5, Lines 1-7. Because the temperatures sensed by temperature sensors 236 and 238 are the same when the level of the cooking oil is above temperature sensor 238, and because the temperature sensed by temperature sensor 238 decreases when the level of the cooking oil falls below temperature sensor 238, it is clear that temperature sensor 236 determines the temperature of the cooking oil, and temperature sensor

238 detects the temperature of the cooking oil or the temperature of air within the cooking vessel, depending on the level of the cooking oil. Nevertheless, neither temperature sensor 236 or temperature sensor 238 determines the temperature of the wall of the cooking vessel. For example, if temperature sensor 238 were detecting the temperature of the wall of the cooking vessel, the temperature sensed by temperature sensor 238 would increase as the level of the cooking oil fell. Therefore, Applicants respectfully request that the Examiner withdraw the anticipation rejection of independent claim 1.

c. Claims 2-22 and 24-40

Claims 2-22 and 24-40 depend from independent claims 1 and 23, respectively. Therefore, Applicants respectfully request that the Examiner also withdraw the rejections of claims 2-22 and 24-40.

Conclusion:

Applicants submit that the above-captioned patent application, as amended, now is in condition for allowance, and such disposition is earnestly solicited. Applicants are enclosing a check in the amount of \$870 covering the requisite large entity fees for filing a Pre-Appeal Brief Request for Review (\$500), a Notice of Appeal (\$250), and a one-month extension of time (\$120). Nevertheless, in the event of any variance between the fees determined by Applicants and the fees determined by the U.S. Patent and Trademark Office, please charge or credit any such variance to the undersigned's Deposit Account No. 02-0375.

Respectfully submitted,
BAKER BOTTS L.L.P.

By: 

Timothy J. Churn
Registration No. 48,340

Dated: December 18, 2006

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